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IN THE
COURT OF APPEALS OF INDIANA

KAREN JOHNSON-QUICK,	)	
	)	
Appellant-Defendant/Cross-Claim Defendant,	)	
	)	
vs.	)	No. 49A05-0605-CV-277
	)	
BILLY D. SEXTON,	)	
	)	
Appellee-Plaintiff/Counterclaim Defendant,	)	
	)	
GLOBE LIFE AND ACCIDENT INSURANCE COMPANY,	)	
	)	
Appellee-Defendant/Counterclaim Plaintiff/Cross-Claim Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patrick L. McCarty, Judge
Cause No. 49D03-0506-PL-24200

March 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Karen Johnson-Quick appeals the trial court's granting of Billy Sexton's motion for judgment on the pleadings. Johnson-Quick raises two issues, which we consolidate, revise and restate as

I. Whether the trial court erred by granting Sexton's motion for judgment on the pleadings; and

II. Whether Johnson-Quick or Sexton are entitled to receive appellate attorney fees.

We reverse and remand for further proceedings.

The relevant facts follow. On July 22, 2002, Globe Life and Accident Insurance Company ("Globe") issued a life insurance policy ("Policy") to Robert J. Pinkstaff. Pinkstaff named Sexton as the primary beneficiary on the Policy, which had a $20,000 death benefit. The Policy contained the following term:

* * * * *

> CHANGE OF BENEFICIARY. By written form satisfactory to [Globe] the Certificate Holder may change the beneficiary at any time, without the beneficiary's consent. When recorded by [Globe] at our Home Office, the change will be effective as of the date the form is signed, whether or not the Certificate Holder is living when the form is recorded. We will have no liability for any action taken by [Globe] before that recording.

* * * * *

Appellant's Appendix at 17.

On April 12, 2004, Pinkstaff contacted Globe by telephone and requested that the beneficiaries on the Policy be changed to Johnson-Quick as the primary beneficiary and Kimberly L. Kindle as the contingent beneficiary. On that same date, Globe issued a

"Beneficiary Endorsement" on the Policy and mailed the Endorsement to Pinkstaff. The Beneficiary Endorsement provided:

> As requested, we have changed our records to reflect the following beneficiary information on the above referenced policy.
>
> Primary Beneficiary: Karen Johnson Quick
>
> Contingent Beneficiary: Kimberly L Kindle
>
> All previous beneficiary designations for this policy are now cancelled. By recording this new change, the Company agrees that any provision of this policy requiring an endorsement of the actual policy so as to affect a change of beneficiary is hereby waived.

Id. at 37.

Pinkstaff died on December 29, 2004. On January 21, 2005, Sexton mailed and faxed a letter of representation and a copy of Pinkstaff's death certificate to Globe in an effort to collect the proceeds from the Policy. Globe rejected Sexton's claim because Globe's records showed Johnson-Quick as the beneficiary. Johnson-Quick also made a claim for the proceeds of the Policy.

On June 23, 2005, Sexton filed a complaint for declaratory judgment, naming Globe and Johnson-Quick as defendants. On July 5, 2005, Globe filed an answer, a counterclaim against Sexton, and a cross claim against Johnson-Quick. On July 27, 2005, Sexton filed a motion for judgment on the pleadings. Johnson-Quick filed her answers on September 2, 2005. In his motion, Sexton argued that he was entitled to judgment because Globe, in its answer, provided no defense to Sexton's cause of action, namely that Sexton is the rightful beneficiary of the Policy because there had been no

valid change of beneficiary. The trial court granted Sexton's motion for judgment on the pleadings.

I.

The first issue is whether the trial court erred by granting Sexton's motion for judgment on the pleadings. Indiana Trial Rule 12(C) provides, in pertinent part, that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." "A Trial Rule 12(C) motion attacks the legal sufficiency of the pleadings." McCall v. State of Indiana Dep't of Natural Res. Div. of Forestry, 821 N.E.2d 924, 926 (Ind. Ct. App. 2005), trans. denied. "The moving party is deemed to have admitted all facts well pleaded, and the untruth of his own allegations that have been denied." Menefee v. Schurr, 751 N.E.2d 757, 760 (Ind. Ct. App. 2001) (citing New Trend Beauty Sch., Inc. v. Ind. State Bd. Of Beauty Culturist Exam'rs, 518 N.E.2d 1101, 1103 (Ind. Ct. App. 1988)), trans. denied. "All reasonable inferences are drawn in favor of the nonmoving party and against the movant." Id. (citing Nat'l R.R. Passenger Corp. v. Everton by Everton, 655 N.E.2d 360, 363 (Ind. Ct. App. 1995), trans. denied). "Our review of a trial court's ruling on a Trial Rule 12(C) motion is de novo, and a motion for judgment on the pleadings will not be granted unless it is clear from the face of the complaint that under no circumstances could relief be granted." McCall, 821 N.E.2d at 926.

Though Johnson-Quick puts forth many arguments in her brief, we find one is dispositive of the very narrow issue of whether the trial court erroneously granted Sexton's motion for judgment on the pleadings. A judgment on the pleadings is granted

or denied based on the information contained within the complaint and the pleadings. "Where the facts shown by the pleadings clearly entitle a party to judgment, a motion for judgment on the pleadings is appropriate." Thompson v. Genis Bldg. Corp., 394 N.E.2d 242, 243 (Ind. Ct. App. 1979). "However, the motion will be overruled if the pleadings present material issues of fact." Id. (citing 1 HARVEY, INDIANA PRACTICE § 12.3 at 609 (1969)). Johnson-Quick argues that Pinkstaff's verbal change of the primary beneficiary from Sexton to Johnson-Quick was valid. Specifically, Johnson-Quick argues that "by telephoning Globe with his verbal request for a change of beneficiary, [Pinkstaff] waived Policy provisions requiring a change of beneficiary be made in writing, and [b]y issuing the 'Beneficiary Endorsement' to Pinkstaff on April 12, [2004], Globe accepted and agreed to that same waiver of the requirement that the change of beneficiary be in writing." Appellant's Brief at 19. Conversely, Sexton argues that the oral change of the primary beneficiary from Sexton to Johnson-Quick was ineffective based on Ind. Code § 27-1-12-14.

"A motion for judgment on the pleadings should be granted only when it is clear from the face of the complaint that *under no circumstances* could relief be granted." National R.R. Passenger Corp., 655 N.E.2d at 363. (emphasis added). Therefore, in order for Sexton to succeed on his motion for judgment on the pleadings, he would have to show, from the face of the pleadings, that under no circumstances could Johnson-Quick be granted relief. In other words, Sexton's complaint would have to show that there are no circumstances under which Pinkstaff's verbal change of beneficiary could be effective. If the facts shown by the pleadings do not clearly entitle Sexton to judgment, a

motion for judgment on the pleadings is inappropriate. Thompson, 394 N.E.2d at 243. We find that the pleadings in this case do not clearly entitle Sexton to judgment and that the trial court erred by granting Sexton's motion for judgment on the pleadings.

Sexton's complaint stated in pertinent part:

* * * * *

6. Globe has wrongfully asserted that defendant [Johnson-Quick] was the beneficiary.

7. Globe wrongfully maintains the beneficiary was changed to [Johnson-Quick], stating, "This change was made effective April 12, 2004, via telephone request from Robert Pinkstaff."

8. Globe's position is contrary to the "Change of Beneficiary" section on top of Page 2 of Policy, which required [Pinkstaff], to change a beneficiary, to:

    A. Sign

    B. A written form

    C. Recorded by Globe

9. The purported change of the primary beneficiary from the plaintiff, [Sexton], to defendant [Johnson-Quick], was and is void ab initio.

* * * * *

Appellant's Appendix at 12. Johnson-Quick's answer to Sexton's complaint stated in relevant part:

* * * * *

6. Johnson-Quick denies the allegations contained in paragraph 6 of [Sexton's] complaint for Declaratory Judgment.

7. Johnson-Quick denies that Globe's actions were wrongful; she is without sufficient knowledge to either admit or deny the remaining

material allegations contained in paragraph 7 of [Sexton's] Complaint for Declaratory Judgment.

8. Johnson-Quick denies the allegations contained in paragraph 8 of [Sexton's] Complaint for Declaratory Judgment.

9. Johnson-Quick denies the allegations contained in paragraph 9 of [Sexton's] Complaint for Declaratory Judgment.

* * * * *

Id. at 75. Globe's answer to Sexton's complaint stated in relevant part:

* * * * *

6. [Globe] admits that [Johnson-Quick] is recorded in its records as the beneficiary of [the Policy]. [Globe] is without knowledge or information sufficient to admit or deny the remaining material allegations contained in paragraph 6 of [Sexton's] Complaint for Declaratory Judgment.

7. [Globe] admits that it maintains that the beneficiary was changed to [Johnson-Quick] stating, "This change was made effective April 12, 2004, via a telephone request from Robert Pinkstaff." [Globe] is without knowledge or information sufficient to admit or deny the remaining material allegations contained in paragraph 7 of [Sexton's] Complaint for Declaratory Judgment.

8. [Globe] denies the allegations contained in paragraph 8, including subparts "A' – "C" of [Sexton's] Complaint for Declaratory Judgment.

9. [Globe] denies the allegations contained in paragraph 9 of [Sexton's] Complaint for Declaratory Judgment.

* * * * *

Id. at 30-31.

In addition, Globe, in the Beneficiary Endorsement sent to Pinkstaff following the change of beneficiary, stated that "All previous beneficiary designations for this policy

are now cancelled. By recording this new change, [Globe] agrees that any provision of this policy requiring an endorsement of the actual policy so as to affect a change of beneficiary is hereby waived." Id. at 37. The question here is whether an oral change of beneficiary could be effective.

Sexton appears to argue that Globe cannot waive the requirement as written in the contract. Id. at 12. We find Sexton's argument inconsistent with Indiana case law.

Ind. Code § 27-1-12-14(c) provides:

> Any person whose life is insured by any life insurance company may name as his payee or beneficiary any person or persons, natural or artificial, with or without an insurable interest, or his estate. A designation at the option of Policy owner may be made either revocable or irrevocable, and the option elected shall be set out in and shall be made a part of the application for the certificate or policy of insurance. **When the right of revocation has been reserved, the person whose life is insured, subject to any existing assignment of Policy, may at any time designate a new payee or beneficiary, with or without reserving the right of revocation, by filing written notice thereof at the home office of the corporation, accompanied by Policy for suitable indorsement thereon.**

(emphasis added). "Where the mode [for a change of beneficiary] is prescribed, it must be followed, as a general rule, in order to render such change effective." Fletcher v. Wypiski, 120 Ind. App. 622, 94 N.E.2d 916, 918 (1950). However, Indiana courts have held that "absolute compliance with the statutory and contractual procedures for changing a beneficiary is not in all situations required to effect such a change." Borgman v. Borgman, 420 N.E.2d 1261, 1265 (Ind. Ct. App. 1981), reh'g denied, trans. denied. Cited exceptions to the general rule state:

> 1. If the [insurer] has waived a strict compliance with its own rules, and in pursuance of a request of the insured to change the beneficiary, has issued a new certificate to him, the original beneficiary will not be heard to

> complain that the course indicated by the regulations was not pursued. 2. If it be beyond the power of the insured to comply literally with the regulations, a court of equity will treat the change as having been legally made. 3. If the insured has pursued the course pointed out by the laws of the association, and has done all in his power to change the beneficiary; but, before the new certificate is actually issued, he dies, a court of equity will decree that to be done which ought to be done, and act as though the certificate had been issued.

Fletcher, 120 Ind. App. at 627, 94 N.E.2d at 918; Olinger v. Nw. Mut. Life Ins. Co., 153 Ind. App. 376, 287 N.E.2d 580, 584 (1972), reh'g denied. The Wypiski court went on to state that:

> [T]he naming of a certain person as a beneficiary in the benefit certificate of a fraternal benefit association, confers no vested right, but a mere expectancy which may be defeated at any time by the act of the insured employer; that where the certificate promises payments to the beneficiary, provided the certificate has not been surrendered and another certificate issued at the request of the insured, in accordance with the laws of the order, the requirement for return of Policy is for the protection of the [insurer], and if complied with to its satisfaction, or waived by it during the lifetime of the insured, it can not be used to support the claim of the former beneficiary.

Fletcher, 120 Ind. App. at 628, 94 N.E.2d at 918.

Insurance policy provisions which require compliance with certain formalities in order to effectuate a change of beneficiary are "for the protection of the company, and not for the protection of the original beneficiary." Id. at 628, 94 N.E.2d at 919. "If a new policy has been issued in the lifetime of the insured[]at his request, the original beneficiary will not be heard to complain that the original policy was not returned." Id. at 628-629, 94 N.E.2d at 920. A review of the caselaw indicates that Globe could, in fact, waive its own requirements regarding a change of beneficiary. Therefore, Pinkstaff's verbal request coupled with Globe's issuance of the new Beneficiary Endorsement

naming Johnson-Quick as primary beneficiary could provide a circumstance under which Johnson-Quick could be granted relief. As such, the trial court erred by granting Sexton's motion for judgment on the pleadings. See, e.g., Basham v. Penick 849 N.E.2d 706, 711 (Ind. Ct. App. 2006) (holding that motion for judgment on the pleadings was erroneously granted where relief could be granted to nonmovant).

II.

The next issue is whether Johnson-Quick or Sexton are entitled to receive appellate attorney fees. Both Johnson-Quick and Sexton argue that they are entitled to appellate attorney fees pursuant to Ind. App. Rule 66(E). Each party argues that the other's actions are frivolous, thus entitling them to appellate attorney fees.

Ind. App. Rule 66(E) provides, in pertinent part, that this court "may assess damages if an appeal, petition, or motion, or response, is frivolous or in bad faith. Damages shall be in the Court's discretion and may include attorneys' fees." However, our discretion to award attorney fees under Ind. App. Rule 66(E) is limited to situations in which "an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay." Thacker v. Wentzel, 797 N.E.2d 342, 346 (Ind. Ct. App. 2003) (citing Orr v. Turco Mfg. Co., Inc., 512 N.E.2d 151, 152 (Ind. 1987)). "Additionally, while Ind. App. Rule 66(E) provides this Court with discretionary authority to award damages on appeal, we must use extreme restraint when exercising this power because of the potential chilling effect upon the exercise of the right to appeal." Id. (citing Tioga Pines Living Ctr., Inc. v. Indiana Family & Soc. Serv. Admin., 760 N.E.2d 1080, 1087 (Ind. Ct. App. 2001), trans. denied).

This court has formally categorized claims for appellate attorney fees into "substantive" and "procedural" bad faith claims. Thacker, 797 N.E.2d at 346.

> To prevail on a substantive bad faith claim, the party must show that the appellant's contentions and arguments are utterly devoid of all plausibility. Procedural bad faith, on the other hand, occurs when a party flagrantly disregards the form and content requirements of the rules of appellate procedure, omits and misstates relevant facts appearing in the record, and files briefs written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court.

Id. Johnson-Quick and Sexton have asserted substantive bad faith claims, each arguing that the other's claims are frivolous. To succeed, each would have to show that the other's contentions and arguments are "utterly devoid of all plausibility." Id. We find that both parties have failed to make this showing.

Sexton argues that he is the rightful beneficiary because the oral change of beneficiary was ineffective because the Policy required all changes to be written, signed, and recorded. Johnson-Quick argues that she is the rightful beneficiary of the Policy because Pinkstaff's oral change of beneficiary was effective because Globe waived its requirement that beneficiary changes be written, signed, and recorded. We cannot say that either of these claims is utterly devoid of all plausibility. See, e.g., Thayer v. Vaughn, 798 N.E.2d 249, 259 (Ind. Ct. App. 2003) (holding that a party was not entitled to appellate attorney fees where he did not establish the utter implausibility of opposing party's claim). Therefore, we find that neither party is entitled to appellate attorney fees.

For the foregoing reasons, we reverse the trial court's grant of judgment on the pleadings for Sexton, remand for further proceedings, and we deny Johnson-Quick's and Sexton's requests for appellate attorney fees.

Reversed and remanded.

SULLIVAN, J. and CRONE, J. concur